UNITED MALAYAN BANKING CORP. BHD.

v.

SYKT. PERUMAHAN LUAS SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 24(31)-835-1986]
11 DECEMBER 1990

CIVIL PROCEDURE: *Costs - Taxation - Earlier bill of costs - Whether could be withdrawn - Gross sum bill - Detailed charges - Whether consent by parties - Interest on disbursements and costs - Whether item under Rules of the High Court 1980 - Rate of interest - Period - Moment retained - Rules of High Court 1980, O. 59 r. 34(1) - Legal Profession Act 1976, ss. 121(1), 132, 133 - Civil Law Act 1956, s. 11.*

LEGAL PROFESSION: *Bill of costs - Taxation - Detailed charges - Consent of parties - Interest on disbursements and costs - Interest - Rate of - Period - Rules of the High Court 1980, O. 59 r. 34(1) - Legal Profession Act 1976, ss. 121(1), 132, 133, Civil Law Act 1956, s. 11.*

UMBC, as a chargee bank, had retained the taxing solicitors (TS) in relation to legal proceedings.

The TS had advised UMBC that in view of the complexity of the matter, their fees would be substantial although no fees were agreed on. After final determination of the proceedings, TS delivered 2 bills to UMBC, one dated 13 August 1988 for RM40,000 and the other 15 December 1988 for RM50,000 (referred to as the earlier bills.) UMBC was of the opinion that the bills were high and sought taxation. As a result, the TS advised UMBC that they were withdrawing the earlier bills and were preparing a new bill of costs for taxation; UMBC agreed to this. UMBC then retained SD as their solicitors in the taxation. A bill of costs was subsequently filed by TS. Soon after, SD undertook, on UMBC's behalf, to settle the bill of costs as taxed.

The Senior Assistant Registrar (SAR) initially ruled in favour of TS and allowed a sum of RM65,658.45; however upon review, the SAR reversed her earlier ruling and relying on Chan Sek Keong J's judgment in the *Berta Services* case, she allowed a sum of RM40,454.15 inclusive of allocatur fees. Under O. 59 r. 36, of the Rules of the High Court 1980 (RHC), TS seek the Court's review of the SAR's decision.

The issues raised were:

(a) whether on taxation the TS could be allowed an amount more than the gross sum bill which they had earlier rendered to their clients, UMBC;

(b) whether as a result of non-independent advice given by TS to UMBC, UMBC's assent to have the bill of costs taxed had been withdrawn of withdrawal;

(c) whether TS could now claim, interest on the amount allowed for taxation as TS had not, in a cross objection notice addressed to the SAR, taken the point; whether the SAR's jurisdiction on review was limited to certain items listed in the cross objection notice;

(d) if claim for 'interest' is an item within the meaning of O. 59 r. 34 whether or not interest should be awarded, in the Court's discretion, on disbursements and costs incurred by the TS;

(e) what period interest should run, and at what rate?

Held:

[1] It is settled law that in cases such as the present, unless it can be demonstrated that the Taxing Registrar has erred on a question of principle, this Court would have no jurisdiction to interfere.

[2] Under ss. 121(1) and 132 of the Legal Profession Act (the Act), the gross sum bill is wiped out, it being of no effect with the result that the detailed bill is not explanatory of the gross sum bill, but is a substituted bill for all purposes so that the amount claimed therein maybe increased.

[3] On the facts and evidence, the TS did require confirmation from the clients as to whether the clients were requesting that TS do tax their bills of costs and whether that by mutual consent no reliance was to be placed on the gross sums bills which were to be withdrawn.

[4] (a) Interest is claimable by a solicitor even though it is not stated in his note of charges; under s. 133 of the Act TS are entitled to request the Court to allow interest on disbursements advanced on the overdraft rate which the TS have to bear;

(b) An award of interest on disbursements and costs incurred by taxing solicitors on behalf of the clients is a legal entitlement of a consequential nature and so is not an item within the meaning of RHC O. 59 r. 36(4).

[5] (a) However, if the claim for "interest" is an item within the meaning of O. 59 r. 34(1), in the exercise of the Court's discretion under O. 59 r. 36(4), interest should be awarded on the disbursements and costs incurred by taxing solicitors.

[6] Following the authorities, interest should run from the date when TS are retained; s. 11 of the Civil Law Act 1956 confers power upon the Court to award interest at such rate as it thinks fit on the whole or any part of the debt.

[Earlier order of SAR restored; later order set aside.]

Cases referred to:

Berta Services Sdn. Bhd. v. Makhanlall & Co. Ltd. [1989] 2 MLJ 269
Coon v. Diamond Tread Co. Ltd. [1950] 2 All ER 385
UMBC v. Perumahan Luas Sdn. Bhd. [1988] 3 MLJ 352
In Re Tilleard [1863] 32 Beav 476
In Re Russell, Son & Scott [1886] 55 LT 71
In Re Taxation of Costs, In re Solicitors [1943] KB 69
Siew Kuen Williams v. Yong Siew In [1984] 1 MLJ 95
Lee Hiok Ping & Ors. v. Lee Hik Woon & Ors. [1989] 2 CLJ (Rep) 1006
London, Chatham & Dover Rly Co. v. South Eastern Rly Co. [1893] AC 429
Blair v. Cordner [1887] 19 QBD 516
Hunt v. R.M. Douglas (Roofing) Ltd. [1988] 3 All ER 833
BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1982] 1 All ER 925
Liau Kim Lian v. Bajuria [1971] 1 MLJ 276

Legislation referred to:

Civil Law Act 1956, s. 11
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3(1)
Legal Profession Act 1976, ss. 121(1), 132, 133
National Land Code 1965, s. 120
Rules of the High Court 1980, O. 59 rr. 36, 34(1),(3), 35(1)

Other source referred to:
Butterworths Costs, 4th Edn., Vol. 1, p. A62

For the client - Mohd Nor (Ong Guat Ean with him); M/s. Wong-Chooi & Mohd. Nor
For the taxing solicitors - N.G. Sivanandan (Karin Lim Ai Ching with him); M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

This was an application by taxing solicitors that the review of taxation of taxing solicitors' bill of costs as between themselves and their own clients ("the clients") herein by the Senior Assistant Registrar be reviewed by this Court pursuant to Rules of the High Court 1980 (RHC) O. 59 r. 36.

The primary question for decision before the Senior Assistant Registrar was whether on the taxation to allow in favour of taxing solicitors an amount more than the gross sum bill which they had earlier rendered to the clients. At first, having had the advantage of full argument, the Senior Assistant Registrar ruled in favour of taxing solicitors and allowed a sum of RM65,658.45. However, upon review, the Senior Assistant Registrar reversed her earlier ruling relying on the judgment of Chan Sek Keong J in *Berta Services Sdn. Bhd. v. Makhanlall & Co. Ltd.* [1989] 2 MLJ 269 and allowed a sum of RM40,454.15 inclusive of allocatur fees.

It is settled law that in cases such as the present, unless it can be demonstrated that the Taxing Registrar has erred on a question of principle, this Court would have no jurisdiction to interfere. (See *Coon v. Diamond Tread Co. Ltd.* [1950] 2 AER 385)

By way of background, it is material to state the facts which gave rise to the present proceedings. The clients who were the chargee bank under a charge registered under the National Land Code 1965, (the Code) had retained taxing solicitors to resist an application by the chargors thereunder, to set aside an order enforcing the charge by way of an order for sale previously made. In the event, after lengthy arguments, I had then granted the chargor the declaration sought and set aside the order for sale on the ground that the charge had been registered in breach of explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s. 120 of the Code, the title or interest of the chargee being defeasible since registration thereof had been obtained by means of an insufficient or void instrument and also because the Registrar of Titles, in registering the charge had acted *ultra vires* the powers conferred upon him. But then, acting on my own motion, and in exercise of my inherent powers to see that justice was done, I had made an order requiring the chargor to execute a fresh charge in terms of the former charge but *mutatis mutandis.* (see *UMBC v. Perumahan Luas Sdn. Bhd.* [1988] 3 MLJ 352). A subsequent appeal and a cross-appeal to the Supreme Court were both dismissed.

Taxing solicitors had before the hearing of the application to set aside the order for sale informed the clients by letter that their fees would be substantial in view of the complexity of the matter but no fees had been agreed. In the event, after the final determination of the proceedings, taxing solicitors delivered to the clients two bills, one dated 13 August 1988 in respect of the proceedings in the High Court for RM40,000 and the other dated 15 December 1988 in respect of the proceedings in the Supreme Court for RM50,000 or, in other words, for an aggregate sum of RM90,000. The clients then replied by letter dated 27 March 1989 stating that they felt that the bills were on the high side and that they would like taxing solicitors to have the bills taxed in the High Court on their behalf. Whereupon, taxing solicitors replied somewhat lengthily by letter dated 5 April 1989 as follows:

Dear Sirs,

Re: Syarikat Perumahan Luas Sdn. Bhd.

Our bills Nos 19689 and 0609 dated 13 August 1988 and 15 December 1988 in respect of Penang High Court O.S. No. 3l-835-86 and Supreme Court C.A. No. 355/88 respectively

We refer to your telefax of 27 March 1989 and having noted the contents therein require your immediate confirmation of the following:

1. Your request to tax our costs in Court in respect of matters handled by us concerning the Penang High Court Originating Summons No. 31-835-86 as from November 1987 to July 1988 and the Supreme Court Civil Appeal No. 355/88 as from August 1988 to December 1988 is pursuant to the Legal Profession Act 1976 s. 126(3), which reads:

   In any case where an advocate and solicitor and his client consent to taxation of a solicitor's bill the Registrar may proceed to tax the bill notwithstanding that there is no order therefore.

2. As indicated in our telefax of 17 February 1989 our bills mentioned above were presented to you not on strictly client and solicitor basis but on a preferential basis out of indulgence owing to our long outstanding relationship between us and the bank. As indicated in the said fax memo we have done a thorough research on taxation on costs between solicitor and client and are fortified from authorities that strictly in law we are entitled to charge very much more. In the circumstances, by mutual consent between you and us no reliance is to be made on our bills mentioned above when our costs is taxed. In the circumstances, the above bills issued by us are duly withdrawn. We are in the process of preparing our Bill of Costs in respect of the above and will file in Court and forward you the same shortly. When we serve the Bill of Costs on you, if you intend to resist, you will have to obtain independent advice as the proceedings in Court will then be between you and us on the question of costs.

As you would appreciate that we intend to maximise strictly in accordance with law the amount of legal fees, disbursements and interest we will be entitled to, we will rely on the Solicitors Remuneration O. 1980 para. 6 which entitles a solicitor to impose 8% per annum on his disbursements and costs from the expiration of one month from demand from the client. The above entitlement sought by us is by virtue of the fact that we had not taken, which is usually done, a substantial retainer fees before attending to the High Court and the Supreme Court matters mentioned above.

As to interest on disbursements, we will be claiming the sum as from the time the disbursements were made by us on your behalf particularly, before 3 September 1988. This again we are seeking strictly in compliance with case authorities. As the disbursements are advanced by us on an overdraft account, the interests claimable by us in law is the rate of interest we have to pay our bankers for the said overdraft.

In your telefax of 27 March 1989 as you are requesting us to tax our costs out of fairness to all parties concerned, we require confirmation to (1) and (2) above to ensure fairness to us when we proceed to tax our costs. In any event, please be informed that our bills mentioned above are withdrawn and will proceed to taxation and serve the bill of costs shortly.

Yours faithfully,

sgd.

The clients then retained Messrs Shearn Delamore & Co., Advocates and Solicitors, on 14 April 1989, to Act for them in the matter of the taxation, a fact which was brought to the attention of the Taxing Registrar. The clients had also by letter dated 2 May 1989, which

was carbon copied to Messrs Shearn Delamore & Co., replied to taxing solicitors' letter aforesaid agreeing to taxing solicitors issuing the fresh bills proposed. That letter was in the following terms:

Dear Sirs,

Re: Syarikat Perumahan Luas Sdn. Bhd.

1. Penang High Court Suit No. 23-300-87
2. Supreme Court of Malaysia Civil Appeal No. 226/87
3. Notice of Appeal to Judge-in-Chambers against the Decision of Senior Assistant Registrar
4. Penang High Court Originating Summons No. 31-835-86
5. Supreme Court of Malaysia Civil Appeal No. 355/88

The above matter refers.

We write to inform you that our management have decided to transfer all the existing suits in respect of the above account to a new firm of solicitors to pursue further on the litigation proceedings against the company and guarantors.

In this connection, kindly arrange to transfer the above files and cause papers to:

M/s Shearn Delamore & Co.
and Drew & Napier
Advocates & Solicitors
6th Floor Wisma Penang Garden
No 42 Jalan Sultan Ahmad Shah
10050 Penang (Attention of Mr Khoo)

Meanwhile, we have instructed our Jelutong Branch to pay you RM10,370.50 being your professional charges and disbursement on the fresh charge.

Please let us have your final bill on the civil proceedings and your fresh bills for above item (4) and (5) as mentioned in your letter dated 5 April 1989.

Yours faithfully,
United Malayan Banking Corporation Berhad

sgd. Ong Boon Hoo
Assistant Manager

Thereafter, on 3 June 1989, taxing solicitors filed a bill of costs at the registry of the High Court for taxation of their fees.

Then, by a letter dated 26 June 1989, Messrs Shearn Delamore & Co., on behalf of the clients, conveyed the clients' express undertaking to settle the bills of costs as taxed. But, although the bill of costs in respect of the High Court proceedings had been taxed and the allocatur therein served upon Messrs Wong, Chooi and Mohd Nor as solicitors for the clients on 14 July 1990, the same has not to date been paid.

So much for the primary facts.

Now, formerly a solicitor could deliver a gross sum bill, but, on demand, had to deliver a detailed one, which could be taxed. However, if the bill as taxed amounted to a larger sum than the gross sum the solicitor could not recover more than the gross sum. (see *In Re Tilleard* [1863] 32 Beav 476 followed in *In Re Russell, Son & Scott* [1886] 55 LT 71)

The present position however is governed by ss. 121(1) and 132 of the Legal Profession Act 1976, the effect of which is that a solicitor might be remunerated in respect of contentious business done by him, not the subject of an agreement, by a gross sum but he has to deliver a detailed bill of charges on demand in which case it can be taxed. In such a situation, the gross sum bill is wiped out, it being "of no effect" with the result that the detailed bill is not explanatory of the gross sum bill, but is a substituted bill for all purposes so that the amount claimed therein may be increased.

In re Taxation of Costs, In re Solicitors [1943] KB 69 where the circumstances were exceedingly like the present case, a firm of solicitors acting in pursuance of the Solicitors' Remuneration (Gross Sum) Order 1934 (1), (which is generally in *pari materia* with ss. 121(1) and 132 of our Legal Profession Act 1976), delivered to their client a gross sum bill. The client duly required a detailed bill of charges to be delivered and the solicitors duly complied with the requisition and the detailed charges were larger than the gross sum bill. The client having taken out a summons to tax, the taxing master held that the solicitors were only entitled to certain items of the gross sum bill and not to the amount of the detailed bill relating to those matters. On a summons to review, taken out by the solicitors, Tucker J dismissed the same and the solicitors appealed. It was held, by the Court of Appeal that the solicitors could recover the amount of the taxed bill although it exceeded the amount of the gross sum first charged.

MacKinnon LJ in the course of his judgment at pp. 72, 73 said this:

> the detailed bill was not merely an explanation of a previous request for payment of a gross sum put forward by the solicitors. It was an alternative charge insisted on by the client under the Solicitors' Remuneration (Gross Sum) Order 1934, and the client exercised her further right under the order to have the detailed bill taxed. If the client exercises those rights, she must bear the burden imposed on her by the order by paying that amount of the detailed bill which is found on taxation to be correct without taking into account the amount of the gross sum first asked for by the solicitor.

And in a concurring judgment Goddard LJ (as he then was) said this:

> If a solicitor delivers a gross sum bill and his client asks for a detailed bill, the solicitor must withdraw his gross sum bill and it is treated as if it had never been delivered. The detailed bill becomes the material bill and it is subject to taxation. That is relevant on the issue of payment of costs where the bill of the solicitor is reduced by more than one sixth. The resulting position seems to me to be just and reasonable. The client who not being satisfied with the gross sum charged, demands a detailed bill of charges must put up with the consequences, if the amount of the detailed bill turns out to be larger than the gross sum first charged. The client should remember the advice given long ago, which is especially true to-day: "Agree with thine adversary quickly, whiles 'thou art in the way with him."

In *Siew Kuen Williams v. Yonn Siew In* [1984] 1 MLJ 95, Siti Norma J applied the principles in *Re Taxation of Costs, In re Solicitors* (*ibid*). In this context, the judgment of Chao Hick Tin, JC in the Singapore case of *Lee Hiok Ping & Ors. v. Lee Hik Woon & Ors.* [1989] 2 CLJ (Rep) 1006, will also repay reading.

Before me, it was argued by Counsel for the clients that although at first glance it would appear from the contemporary correspondence in the case to which I have referred that the clients had assented to taxing solicitors withdrawing the gross sum bills of costs and filing fresh bills of costs for taxation, on a proper construction thereof and, having regard to the circumstances of the case, the clients' assent was not a true assent since it was given as a result of advice given by taxing solicitors which was not independent advice.

I regret I find this submission unacceptable. The clients in this case were a financial institution and they had, upon receipt of the gross sum bills, made a categorical request by the fax message dated 27 March 1989 requesting taxing solicitors "to have the bills taxed on our behalf". In response to this, taxing solicitors very properly replied by letter dated 5 April 1989 agreeing to the clients' request that the bills be taxed, adding that the gross sum bills were withdrawn and that they would be maximising the amount of their legal fees and costs. Moreover, they had cautioned the clients to seek independent advice once the bills of costs were served upon them. But what was more to the point was that taxing solicitors in the concluding para of their letter required confirmation from the clients on two points, namely, (1) that clients were requesting that taxing solicitors do tax their bills of costs and (2) that by mutual consent no reliance was to be placed on the gross sums bills which were to be withdrawn.

The clients then retained Messrs Shearn Delamore & Co. to act for them and it was common ground that this was on 14 April 1989. Having no doubt had the advantage of this independent advice, they had then replied by letter dated 2 May 1989, with copy to Messrs Shearn Delamore & Co., giving the confirmation requested in the following words:

> Please let us have your final bill on the civil proceedings and your fresh bills for items (4) and (5) as mentioned in your letter dated 5 April 1989.

In these circumstances, the submission of Counsel for the clients that the latter's assent to have the bills of costs taxed and to treat the gross sums bills as withdrawn because it was vitiated by undue influence exerted by instructing solicitors must lose all its sting. It follows, that the stricture by Counsel for the clients that the filing of the bill of costs for a higher sum than the gross sum bill "would not be far short of blackmail", was groundless and, indeed, should never have been made.

The secondary question for decision before me, which arose following a preliminary objection by Counsel for the clients was this. It was said that it was not now open to taxing solicitors to make a claim for interest on the amount allowed for taxation as taxing solicitors had not in a cross objection notice addressed to the Senior Assistant Registrar taken the point. It was emphasised that the review by the Senior Assistant Registrar was not at the instance of taxing solicitors but the clients.

Counsel then cited in support RHC 1980 O. 59 r. 34(1), (3) and r. 35(1) which he urged, limited the Senior Assistant Registrar's jurisdiction on review to a consideration of the items specifically listed in the cross objection notice.

I over-ruled the objection, *in limine*, as being devoid of substance for reasons which I shall now state.

It is too well known to need citation of authority that the object of an award of interest is not to compensate a successful party for any damage done, but for him being kept out of his money. (see, however, *London, Chatham & Dover Rly Co. v. South Eastern Rly Co.* [1893] AC 429, 437.)

Moreover, the interest is claimable by a solicitor even though it is not stated in his note of charges. So, for example, in *Blair v. Cordner* [1887] 19 QBD 516, a solicitor delivered his bill to a client without claiming interest; the bill was taxed and the client paid the amount allowed on taxation. The solicitor then claimed interest thereon at 4 per cent from one month from the date of delivery of the bill. It was held that the solicitor was entitled to such interest. The words "From demand" mean "from sending in the bill".

And, indeed, under s. 133 of our Legal Profession Act 1976, taxing solicitors are entitled to request the Court to allow interest on disbursements advanced on the overdraft rate which the taxing solicitors have in fact to bear. It was pointed out by Counsel for the taxing solicitors, without challenge, that the contemporary correspondence indicated that taxing solicitors had in fact financed the clients' litigation relying on an overdraft account for this purpose.

In my view, the above considerations indicate that an award of interest on disbursements and costs incurred by taxing solicitors on behalf of the clients, is a legal entitlement of a consequential nature and so is not an "item" within the meaning of RHC O. 59 r. 34(1).

Alternatively, if contrary to my primary view, the claim for "interest" is an item within the meaning of O. 59 r. 34(1), then I have to consider whether or not to make an award of interest on the disbursements and costs incurred by taxing solicitors, in the exercise of my discretion under O. 59 r. 36(4).

In Hunt v. R.M. Douglas (Roofing) Ltd. [1988] 3 AER at p. 833, Lord Ackner, speaking for the House of Lords said, *inter alia*, this:

> Barristers, solicitors and expert witnesses should not be expected to finance their clients' litigation until it is completed and the taxing master's certificate obtained. If interest is not payable on costs between judgment and the completion of taxation, then there is an incentive to delay payment, delay disbursements and taxation.

According to *Butterworths Costs*, 4th Edn., Vol. l, p. A62, a solicitor can (like any other creditor) in an action against his client for his costs, include a claim for interest on such costs as from the date when the claim arose (see s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934) which is equivalent to our s. 11 of the Civil Law Act 1956).

And as already noted, taxing solicitors had in fact financed the clients' litigation relying on an overdraft account. Accordingly, reason and justice point to the conclusion that taxing solicitors should be awarded interest on the disbursements and costs incurred by them on behalf of the clients.

The next questions are, for what period should the interest run and, at what rate?

As regards this part of the case, it is material to consider when the cause of action arose in favour of taxing solicitors against the clients?

In *Siew Kuen William's* case (*ibid*), Siti Norma J said at p. 97:

> In the case of a solicitor and client bill the obligation to pay becomes due the moment the client engages the services of an advocate ...

And, the following passage in the judgment of Lord Brandon of Oakbrook in *BP Exploration Co. (Libya) Ltd. v. Hunt* (No. 2) [1982] 1 AER 925, 992 provides some indirect support for that view:

> It is, in my view, clear that there cannot be any general rule that, whenever the amount of any debt or damages payable by one party to an action to the other cannot be ascertained until judgment is given, the Court should never, in the exercise of its discretion, award interest from a date earlier than the date of such judgment. To apply such a rule would, in my opinion, be plainly inconsistent with the express terms of s. 3(1), (Law Reform (Miscellaneous Provisions) Act 1934, equivalent to s. 11 of our Civil Law Act 1956) and in many cases, for instance in the case of a claim on a quantum meruit, work serious injustice on a successful plaintiff.

Accordingly, I agree with the view that interest should run from the date when taxing solicitors are retained.

As for the rate of interest, s. 11 of the Civil Law Act 1956, confers power upon the Court "to award interest at such rate as it thinks fit on the whole or any part of the debt ..."

However, before me, Counsel for taxing solicitors said that to simplify matters, taxing solicitors were prepared to claim interest at the rate of 8% p.a. only from one month after the date of the service of the bill upon the clients which was 13 September 1988 to date of taxation.

In all the circumstances, I would grant the application and set aside the order of the Senior Assistant Registrar dated 28 June 1990 allowing, on review of taxation, the sum of RM40,454.15 (inclusive of allocatur fees) and restore her earlier order dated 15 March 1990 allowing, on original taxation, the sum of RM65,658.45 but this will be exclusive of the allocatur fees. There will also be consequential orders entitling taxing solicitors to payment of interest at the rate of 8% p.a. on disbursements and costs incurred by them with effect from 13 September 1988 that being the date of expiry of one month from date of the service of the bill on the clients, and interest after taxation at the rate of 8% p.a. from date of taxation to date of payment. (see *Liau Kim Lian v. Bajuria* [1971] 1 MLJ 276 FC).

Finally, the clients must also pay taxing solicitors the costs of the proceedings both here and before the Senior Assistant Registrar.

Also found at [1991] 1 CLJ 594